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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 24 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules to)
Establish Competitive Safeguards for)
Local Exchange Carrier Provision of)
Commercial Mobile Radio Services)

WT Docket No. 96-162

Implementation of Section 601(d) of the)
Telecommunications Act of 1996, and)
Sections 222 and 251(c)(5) of the)
Communications Act of 1934)

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Amendment of the Commission's Rules to)
Establish New Personal Communications)
Services)

GEN Docket No. 90-314

Requests of Bell Atlantic-NYNEX Mobile,)
Inc., and US West, Inc., for Waiver of)
Section 22.903 of the Commission's Rules)

REPLY COMMENTS OF CMT PARTNERS

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SUMMARY

CMT Partners reiterates its urging that the Commission retain its cellular structural separation safeguards--and extend them to all other broadband Commercial Mobile Radio Services provided by Tier I LECs.

The record reflects that structural separation is the most appropriate and necessary safeguard to permit meaningful wireless competition. Among other things, the Commission has already found that the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold. Various commenters in this proceeding have documented BOC abuses that evidence a need for structural separation safeguards.

Whereas the need for structural separation safeguards was evident when comments were submitted in this proceeding, more recent developments that have raised questions regarding the near-term effectiveness of the Commission's recently adopted interconnection rules present a further basis for structural separation.

In contrast to the above, BOCs and other Tier I LECs have made no definitive showing that structural separation would be unduly costly. Nor have they presented any other justification not to implement these safeguards. Their arguments that structural separation would violate regulatory parity concepts are wholly

unfounded, especially if the structural separation safeguards are extended to cover the provision of any broadband wireless service by any Tier I LEC.

Protections to the use of CPNIs is essential to establish a pro-competitive environment. Affirmative written authorization by subscribers is essential before CPNI can be used for other purposes. Where request for such authorization is made, the authorization should make CPNI available to all wireless carriers.

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REPLY COMMENTS OF CMT PARTNERS

CMT Partners ("CMT"),^{1/} by its attorneys and pursuant to Section 1.415 of the Commission's rules, respectfully submits its Reply Comments in response to the Notice of Proposed Rulemaking in the captioned proceeding.^{2/} For the reasons set forth below, CMT

^{1/} CMT is the parent company for four Commission licensees: Bay Area Cellular Telephone Company, Napa Cellular Telephone Company, Cagal Cellular Communications Corporation and Salinas Cellular Telephone Company. Collectively, these entities provide Band A cellular service in the San Francisco, San Jose, Napa, Salinas and Santa Rosa, California. CMT is also the licensee of the following Band A cellular markets in Kansas: Kansas City, Kansas/Missouri MSA and Lawrence, Kansas MSA. CMT is also the parent company of St. Joseph CellTelco which provides the Band A service in the St. Joseph, Missouri MSA.

^{2/} Notice of Proposed Rule Making, WT Docket No. 96-162 and GEN Docket no. 90-314, 61 Fed. Reg. 46420 (September 3, 1996) ("Notice"). In the Notice, the Commission provided that reply comments be filed 51 days after Federal Register publication, i.e., by October 24, 1996. Accordingly, these reply comments are timely filed.

reiterates its urging that the Commission retain, its cellular structural separation safeguards--and extend them to all other broadband Commercial Mobile Radio Service ("CMRS") and to all Tier I Local Exchange Service ("LEC") providers. These protections are absolutely the minimum necessary in order to foster genuine wireless competition, as well as local exchange competition between wireless and wireline carriers.

CMT also submits that, while structural separation was both appropriate and necessary at the time comments in this proceeding were filed, subsequent developments have made them even more necessary. In particular, the recent action of the Eighth Circuit staying the Commission's recently adopted interconnection rules has complicated the interconnection process and thereby provided an additional need for structural separation.

I. INTRODUCTORY STATEMENT

CMT's review of the public files reflects that 20 parties filed comments in the captioned proceeding. Not surprisingly, the parties were somewhat evenly split, and took vastly different positions, on the pivotal issues in this proceeding: Whether structural safeguards and meaningful protections for use of CPNI should continue in effect. All non-LEC wireless carriers, and the only state commission participating in this proceeding, urged the Commission to maintain its structural separation requirements and extend them to all wireless services and all Tier I LECs, rather than have them apply only to cellular. The Bell Operating

Companies ("BOCs") and other Tier I local exchange carriers sought elimination of the structural separation safeguard.

**II. STRUCTURAL SEPARATION SAFEGUARDS MUST BE MAINTAINED
AND EXPANDED TO APPLY TO ALL TIER I LECs IN THEIR
PROVISION OF ANY IN-REGION WIRELESS SERVICE**

**A. Structural Separation is the Most
Appropriate and Necessary Safeguard
to Permit Meaningful Wireless Competition**

In its comments in this proceeding, CMT reminded the Commission that Congress recognized the continuing appropriateness of structural safeguards in various instances. (CMT Comments, at 5.)^{3/} CMT also noted that the Commission has already made the crucial finding that

the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable, and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold.

Id., at 10. Thus, CMT explained there to be a continuing need for structural separation.

Non-LEC commenters universally echoed CMT's position regarding structural separation. AT&T Wireless Services, Inc. ("AT&T Wireless") adroitly focused on the key consideration for the issue at hand: the FCC's recognition that the fundamental rationale underlying structural separation has not changed since its inception, and that continuation of this safeguard is necessary to

^{3/} See, e.g., the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") at Section 271 (BOC InterLATA Entry), Section 273 (Manufacturing), and Section 274 (Electronic Publishing). Separate subsidiaries were mandated in each instance.

foster the wireless competition. (AT&T Wireless Comments, at 4-5). AirTouch Communications, Inc. ("AirTouch") correctly observed that the risks to competition that are inherent in the interplay between the monopoly provision of local exchange service and wireless will only expand as BOC's move into new wireless ventures. (AirTouch Comments, at 1-2.) The Public Utilities Commission of Ohio ("PUCO") properly explained that structural separation lessens the opportunities for cost-shifting, pure discrimination and interconnection discrimination, and increases the ability of both competitors and the FCC to detect any anti-competitive behavior. (Comments of PUCO, at 6.) Radiofone, Inc. ("Radiofone") correctly pointed to the fact that BOCs and other Tier I LECs still control bottleneck facilities, and that no meaningful local exchange competition has yet developed. (Radiofone Comments, at 5.) MCI Telecommunications Corporation ("MCI") appropriately pointed to the fact that the factual predicate for the structural separation requirement has not changed since the FCC initially adopted it. (MCI Comments, at 5.)

**B. The Record is Replete with Showings of
BOC Violations of Pro Competitive Safeguards**

The Commission has already determined held that "[B]ased on the extensive record in the LEC-CMRS Interconnection proceeding [CC Docket Nos. 95-185 and 94-154], as well as in this proceeding, we conclude that, in many cases incumbent LECs appear to have imposed arrangements that impose little or no compensation for calls terminated on wireless networks, and in some cases imposed charges

for traffic originated on [LECs] networks, both in violation of Section 20.11 of our rules.^{4/} First Report and Order in CC Docket Nos. 96-98 and 95-185, FCC 96-325, 61 Fed. Reg. 45476 (August 29, 1996) (the "First Local Competition Order"). This finding is wholly consistent with Commission findings in other proceedings. See, e.g., Baton Rouge MSA Limited Partnership, 8 FCC Rcd 2889 (1993), where the Commission had to intercede to have BellSouth to provide roaming interconnection.

Various commenters in this proceeding have also recounted a virtual litany of BOC abuses that demonstrate the need for continuing structural separation safeguards. MCI properly reported to federal/state audits that have confirmed that "improper cost shifting can and does occur". (MCI Comments, at 10, citing Ameritech, Consent Decree Order, 10 FCC Rcd 13846, 13866-68 (1995)). Radiofone pointed to a pattern of abuses including failure by BOC affiliates to charge unaffiliated and affiliated entities similarly for roaming services. (Radiofone Comments, at 2-3, citing its formal complaint before the Commission entitled Radiofone, Inc. v. BellSouth Mobility, Inc., File No. E-88-109, filed August 2, 1988, and supplemented on June 15, 1991, and on June 16, 1995, to bring to the FCC's attention BellSouth's continuing pattern of anti-competition abuse.) Similarly, AT&T Wireless demonstrated that the public record reflects "that key

^{4/} In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325 at 1094 (rel. Aug. 8, 1996 ("First Local Competition Order").

informational exchange between BOCs and their affiliates are often not made available to their competitors or disclosed to the public. (Comments of AT&T Wireless, at 7, citing National Association of Regulatory Utility Commissioners ("NARUC"), An Audit of the Affiliate Interests of Pacific Telesis Group, July 1994, at B33-B35, where misallocation of PCS expenses was found to have existed for several years.

These documented abuses remove any question with respect to whether the BOCs have historically taken advantage of their monopoly LEC position.

**C. Uncertainty Surrounding the Commission's
Interconnection Rules Provides a Further
Basis for Structural Separations**

On August 1, 1996, the Commission adopted its First Local Competition Order thereby promulgating interconnection rules as contemplated by the 1996 Act and as necessary to foster meaningful competition in the provision of local exchange service and wireless service.^{5/} Among other things, those rules required LECs to provide reasonable cost-based interconnection charges, to recognize the concept of reciprocal compensation that had previously gone unimplemented (see First Local Competition Order, at para. 1094), and to provide effectively "most favored nations" status to all entities seeking interconnection.

The Commission interconnection rules would not, by themselves, obviate the need for structural separation. They would, however,

^{5/} Ibid.

have facilitated competition in wireless. Unfortunately, in response to attacks on the rules that were led by various LECs, on October 15, 1996, the U.S. Court of Appeals, Eighth Circuit, issued an Order Granting Stay Pending Judicial Review, 1996 WL 589204 (Eighth Circuit), ___ F.3rd ___ (the "Stay Order"). The effect of the Stay Order has been to remove any protections that would have stemmed from the Commission's First Local Competition Order, at least temporarily, and possibly for one year or more. The Eighth Circuit's action, while regrettable for a number of reasons, does evidence that the Commission cannot confidently look to other safeguards that would lessen the need for structural separation safeguards.

D. No Showing has Been Made That Structural Separation Would be Unduly Costly

In its Comments in this proceeding, CMT properly observed that the Commission itself had found in its Notice that the BOCs had not presented quantified evidence of undue costs or other burdens associated with structural separation. (CMT Comments, at 9, citing the Notice, at para. 28-29.) This continues to be the case. Notwithstanding the Commission's invitation for data of this type, and the submission of hundreds of pages of comments by BOCs and other LECs urging the removal of structural separation safeguards, no meaningful quantified showing of undue costs has been submitted, and no persuasive anti-structural separation showing of any type of has been submitted.

Opponents of structural separation instead argued that the record does not reflect any need for such safeguards, that continuation of Section 22.903 would violate the concept of regulatory parity and that continued use of structural safeguards would somehow violate a recent ruling by the U.S. Court of Appeals for the Sixth Circuit.^{6/} As demonstrated below, none of these arguments presents a valid basis for not maintaining and extending the structural safeguards as proposed by CMT.

**1. The Record Reflects a
Pattern of Abuse by LECs**

Comments of SBC Communications, Inc. ("SBC"), Bell Atlantic Corporation and Nynex Corporation ("Bell Atlantic/Nynex") and BellSouth Corporation ("BellSouth") addressing whether "the record" reflects a need for structural separation are telling. For example, SBC suggests that concerns regarding BOC abuses of CMRS providers "are unjustified by any reasonable theory or by actual market experience", and that "[T]here is simply no history of actual complaints or claims of such discrimination or anti-competitive behavior". (SBC Comments, at 4.) Similarly, Bell Atlantic/Nynex asserted that "there is no concrete evidence that an LEC has, can or would use landline market power to distort and impair competition in the CMRS market. (Bell Atlantic/Nynex Comments, at 14.) And BellSouth told the Commission that "[T]here is no evidence that the BOCs in particular are likely to

^{6/} Cincinnati Bell Telephone v. FCC, 69 F 3rd 752 (Sixth Cir., 1995).

discriminate in interconnection or to cross-subsidize cellular service, and there is no evidence that the absence of a structural separation requirement for non-BOC telephone companies has led to abuses". (BellSouth Comments, Summary, p. 1.)

CMT submits that these BOC assertions are revisionists, at best, and simply do not appear to be accurate. The prior holdings of the Commission and the examples of abuses raised by other commenters in this proceeding, and recounted in Section IIB, above, evidence the BOC abuses that SBC and BellSouth apparently do not understand to exist. When the Commission reviews the record of abuses documented in this proceeding and compares it to the SBC, Bell Atlantic and BellSouth assertions, CMT believes that the Commission can only find there to be a track record that evidences a need for continued application of structural separation safeguards.

**2. Regulatory Parity Presents No Bar
to Implementation of Extended
Structural Separation Safeguards**

All parties in this proceeding that advocate continued use of structural separation safeguards urge that they apply to all Tier I LECs providing any wireless service. (See, e.g., CMT Comments, at 2; AirTouch Comments, at 2; and AT&T Wireless Comments, at 4.) Commission action consistent with this position removes any arguable claim that regulatory parity would be violated by structural separation rules being applied to cellular, but not PCS, or to BOCs, but not other Tier I LECs, who also provide wireless service.

The only other basis for a regulatory parity claim is that it is somehow improper for the Commission to impose one set of obligations on large LECs, yet not impose that type of obligation on other wireless providers. CMT submits that such a position ignores the limitations inherent in Congressional and Commission requirements for regulatory parity. Simply put, obligation for regulatory parity extends only to similarly situated entities.^{17/} By virtue of their size and monopoly status as a provider of local exchange service Tier I LECs are uniquely situated. As such, no regulatory parity concept is violated by treating them differently from other carriers who do not have benefit from having provided monopoly service for years. Indeed, the underlying rationale from regulatory parity, i.e., to establish a "level playing field" for all competitors, can be furthered only applying regulatory safeguards, such as structural separation, in order to remove substantial competitive advantages that Tier I LECs would otherwise possess.

3. Expanded Implementation of Structural Separation Safeguards Would be Wholly Consistent with the Recent Decision of the Sixth Circuit

In its recent decision, the Sixth Circuit did not take issue with the concept of structural separations. Rather, it asked only

^{17/} See 47 USC §332, as amended by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI §6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993). See also the Commission's Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1418 (1994).

if (PCS) and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete for customers on price quality and services...what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?

Cincinnati Bell, supra, at 768. In other words, the Sixth Circuit raised only a regulatory parity issue. That issue will have been mooted if the Commission adopts the expanded use of structural separation as proposed by CMT and the other non-LEC commenters. Accordingly, it presents no barrier to continued use of such safeguards.

**III. PROTECTIONS TO THE USE OF CPNI IS ESSENTIAL
TO ESTABLISHING A PRO-COMPETITIVE ENVIRONMENT**

The non-BOC commenters in this proceeding urged that affiliates of LECs be permitted to access CPNI only with the express written consent of subscribers. See, e.g., Comments of AirTouch, at 10, where the "affirmative written authorization" of subscribers was urged; Radiofone Comments, at 10, urging that requests to make CPNI available must be framed so that it will be available to all carriers (i.e., publicly available), rather than being made available only to the LEC's CMRS affiliate; and Comments of Comcast Cellular Communications, Inc., at 14, and Cox Communications, Inc., at 7, both explaining that predications regarding the use of CPNI are not in any way restricted by the "joint marketing" provisions of Section 601(d), since the sole extent of that section was to "help put the Bell operating companies on par with their competitors. See, also, Comments of

AirTouch, at 7, where AirTouch urges the Commission to borrow from its "anti-slamming" requirements set forth in Section 64.1150 of the rules, in order to provide clarity with respect to what information must be included in a written request for use of CPNI.

CMT reiterates its urging (CMT Comments, at 15-16) that no substantive modifications to the existing Section 22.903 restrictions on the use of CPNI are necessary. Moreover, CMT supports Radiofone's urging that, if request to make CPNI available to any affiliate of an LEC is made, such request must be presented such that the CPNI at issue will be available to all carriers. CMT also urges the Commission to adopt a proposal as made by AirTouch that the Commission provide guidance with respect to access to CPNI, which guidance mirrors that currently in use by the Commission to protect against slamming. Only by so acting can the Congressional intent^{8/} to put the BOCs "on par" with their competitors be met.

IV. CONCLUSION

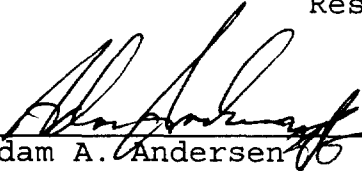
CMT compliments the Commission for initiating this rulemaking proceeding. Ultimately, it should foster a truly level playing field for CMRS. CMT supports generally the Commission's proposal to retain the structural separation safeguards of Section 22.903 as provided for in Option 1, and to expand them as set forth herein. It also urges continued application of CPNI protections. Accordingly, CMT urges the Commission not to accept the unfounded

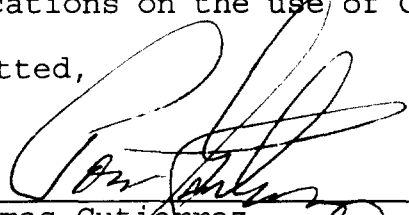
^{8/} See 141 Cong. Rec H8456 (daily ed. August 4, 1995) (statement of Mr. Burr).

arguments that competition can somehow be properly fostered without structural separation, or without predications on the use of CPNI.

Respectfully submitted,

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October 24, 1996

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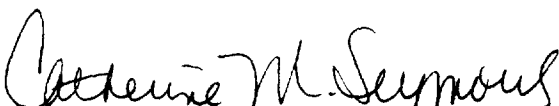
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